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OMEGA SECURITIES SDN BHD

v.

LT GEN (B) TAN SRI MOHAMED NGAH SAID

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COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
SURIYADI HALIM OMAR JCA
ALIZATUL KHAIR OSMAN JCA
[CIVIL APPEAL NO: W-02-1891-2009]

C

8 AUGUST 2012

SECURITIES: *Shares - Trading account - Contra losses - Failure to indemnify appellant - Contemporaneous documentary evidence - Whether respondent applied for non-margin facility account - Whether there was a*

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binding contract between parties - Whether respondent indebted to appellant - Whether respondent objected to transaction - Whether defence a bare denial - Whether terms and conditions in agreement applied to both margin and non-margin account

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This was an appeal by the appellant against the decision of the High Court in dismissing its claim against the respondent for contra losses arising from the sale and purchase of UCB shares. By virtue of an Individual Account Application Form ('the agreement'), which contained the terms and conditions governing

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the account, the respondent had agreed to open a non-margin facility account with the appellant. In relation to this, it was agreed that the appellant was to sell the shares when required and the respondent would then indemnify the appellant when the need arose. However, the agreement was terminated by the appellant

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when the respondent failed to indemnify the appellant and as a result, a suit was then filed in the High Court to demand for the sum due and owing. Among the undisputed contemporaneous documents adduced were, (i) the agreement; (ii) the statement of accounts showing the respondent's indebtedness and transaction

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history; (iii) the purchase contract notes; and (iv) the letter of authorisation. The respondent asserted, *inter alia*, (i) that he did not know there was a facility opened under his name with the appellant; and (ii) that he did not receive the statement of outstanding sum due. The trial judge held that since the appellant

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had not produced the non-margin facility agreement but only the agreement of which there was no indication whether the

respondent had actually applied for a margin or non-margin account, and in the absence of any evidence from the plaintiff that the defendant had in fact given instructions to trade in the UCB shares, it was found that the appellant had not discharged its burden of proof. Dissatisfied with the said decision, the appellant appealed to this court.

Held (allowing appeal with costs; setting aside decision of High Court)
Per Alizatul Khair Osman JCA (majority):

(1) The learned judge had erred in law and in fact for failing to consider and to judicially appreciate the relevant contemporaneous documentary evidence which established on a balance of probabilities that there was a concluded and binding contract between the parties and that the respondent was indebted to the appellant as claimed. (para 12)

(2) The learned judge had uncritically accepted the respondent's testimony without properly evaluating and weighing the said testimony against the respondent's contemporaneous conduct and documents. More importantly, she failed to judicially appreciate that the respondent's testimony consisted of a bare denial which lacked any probative value. (para 14)

(3) The learned judge failed to give sufficient regards in relation to the fact that, *inter alia*, (i) the respondent had failed to protest to the transactions or usage of his non-margin trading account; (ii) the legal implication on the respondent's failure to protest or object to the transactions at the material time; and/or (ii) the fact that fraud or forgery was not pleaded by the respondent. (para 15)

(4) In finding that there was no evidence to indicate whether the respondent had applied for a margin or non-margin facility trading account, the learned judge failed to appreciate that cl. 1 of the agreement which clearly provided that the terms and conditions in the said agreement applied to both margin and non-margin trading account. (para 17)

(5) The learned judge erred in holding that the appellant could not rely on cl. 13 of the agreement to establish that the statement of account showing the respondent's indebtedness was final and conclusive for the purpose of legal proceedings

A on the ground that cl. 13 and the other terms and conditions of the agreement were not in respect of the terms and conditions for the non-margin account but in respect of a margin account. (para 18)

B **Per Suriyadi Halim Omar JCA (dissenting):**

(1) The agreement was not dated and stamped. Based on s. 52 of the Stamp Act 1949, such document was inadmissible in court as evidence. Further, the authorisation letter did not mention the authorised person who would deal with the
C account. The agreement was not properly executed and it did not establish the existence of a non-margin facility agreement. (paras 22 & 23)

Bahasa Malaysia *Translation Of Headnotes*

D

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi dalam menolak tuntutannya terhadap responden berkenaan kerugian kontra yang berbangkit daripada perjualan dan pembelian saham UCB. Melalui borang permohonan akaun individu
E ('perjanjian'), yang mengandungi terma-terma dan syarat-syarat mengawal akaun itu, responden telah bersetuju untuk membuka akaun kemudahan tanpa margin dengan perayu bagi tujuan, antara lain, membeli saham melalui responden. Berkenaan perkara ini, ianya telah dipersetujui bahawa perayu akan menjual saham apabila
F diperlukan dan responden akan membayar ganti rugi apabila keadaan memerlukannya. Walau bagaimanapun, perayu telah menamatkan perjanjian apabila responden gagal untuk memberi ganti rugi kepada perayu. Tindakan kemudiannya telah difailkan oleh perayu bagi menuntut jumlah yang masih terhutang oleh
G responden. Antara dokumen-dokumen semasa yang dikemukakan adalah, (i) perjanjian; (ii) penyata-penyata akaun yang menunjukkan hutang dan sejarah transaksi responden; (iii) nota kontrak pembelian; dan (iv) surat pemberian kuasa. Responden pula berhujah, antara lain, (i) bahawa beliau tidak tahu adanya suatu
H kemudahan yang dibuka di bawah namanya dengan perayu; dan (ii) bahawa beliau tidak menerima penyata bagi jumlah terhutang. Hakim perbicaraan memutuskan bahawa memandangkan perayu tidak mengemukakan perjanjian kemudahan tanpa margin tetapi hanya perjanjian yang tidak menunjukkan sama ada responden
I telah sebenarnya memohon untuk akaun margin atau tanpa margin, dan dalam ketiadaan keterangan daripada perayu bahawa responden telah memberi arahan untuk berdagang dalam saham

UCB, didapati bahawa perayu tidak melepaskan beban pembuktiannya. Tidak puas hati dengan keputusan tersebut, perayu merayu ke mahkamah ini.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan keputusan Mahkamah Tinggi)
Oleh Alizatul Khair Osman HMR (majoriti):

(1) Yang arif hakim khilaf dari segi undang-undang dan fakta kerana gagal untuk mempertimbangkan dan menghargai keterangan dokumen semasa yang membuktikan atas imbangan kebarangkalian bahawa telah ada suatu kontrak yang mengikat di antara pihak-pihak dan bahawa responden terhutang terhadap perayu seperti dituntut.

(2) Yang arif hakim telah tanpa kritis menerima keterangan responden tanpa menilai dan menimbang keterangan tersebut terhadap kelakuan dan dokumen semasa responden. Beliau juga telah gagal untuk menilai secara kehakiman bahawa keterangan responden merangkumi suatu penafian kosong yang kekurangan nilai probatif.

(3) Yang arif hakim gagal memberi pertimbangan berkenaan fakta, antara lain, (i) bahawa responden telah gagal membantah transaksi atau pun penggunaan akaun perdagangan tanpa marginnya; (ii) kesan undang-undang terhadap kegagalan responden untuk membantah transaksi pada masa material; dan/atau (iii) fakta bahawa fraud atau penipuan tidak diplid oleh responden.

(4) Dalam dapatan bahawa tiada keterangan yang menunjukkan sama ada responden telah memohon untuk akaun perdagangan kemudahan margin atau tanpa margin, yang arif hakim telah gagal untuk menghargai kl. 1 perjanjian yang jelas menyatakan bahawa terma-terma dan syarat-syarat dalam perjanjian itu terpakai bagi kedua-dua akaun perdagangan margin dan tanpa margin.

(5) Yang arif hakim khilaf dalam memutuskan bahawa perayu tidak boleh bergantung atas kl. 13 perjanjian untuk membuktikan bahawa penyata akaun menunjukkan hutang responden adalah akhir dan muktamad bagi tujuan prosiding perundangan atas alasan bahawa kl. 13 dan terma-terma dan syarat-syarat lain adalah bukan bagi akaun tanpa margin tetapi untuk akaun margin.

Oleh Suriyadi Halim Omar HMR (menentang):

(1) Perjanjian tidak mempunyai tarikh dan tidak disetemkan. Berdasarkan s. 52 Akta Setem 1949, dokumen sebegitu tidak boleh diterima oleh mahkamah sebagai keterangan. Lagi pun, surat pemberian kuasa tidak menyatakan siapakah yang diberi kuasa untuk mengendalikan akaun itu. Perjanjian tidak disempurnakan dengan betul dan ianya tidak membuktikan kewujudan suatu perjanjian kemudahan tanpa margin.

Case(s) referred to:
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 90A
Stamp Act 1949, s. 52

For the appellant - Bahari Yeow; M/s Lee Hishamuddin Allen & Gledhill
For the respondent - D Paramalingam; M/s Krish Maniam & Co

[Appeal from High Court, Kuala Lumpur; Suit No: D7(D3)-22-909-2000]

Reported by Kumitha Abd Majid

JUDGMENT

Alizatul Khair Osman JCA:

[1] This was an appeal by the appellant, (the plaintiff in the High Court) Omega Securities Sdn Bhd against the decision of the learned High Court Judge who had after a full trial dismissed the appellant's claim with costs. We had, by a majority, allowed the appellant's appeal.

[2] The appellant's claim against the respondent was basically for contra losses arising out of the sale and purchase of UCB shares. The brief facts of the case are essentially as follows:

[3] By a written agreement (the said agreement) between the appellant and the respondent, the respondent had agreed to open a non-margin facility account with the appellant for the purpose of, *inter alia*, purchasing shares through the respondent. Pursuant to the said agreement, the appellant had carried out purchase of the shares on behalf of the respondent and upon instructions by

the respondent. Contract notes for each and every purchase of the shares by the appellant on behalf of the respondent had been forwarded to the respondent. A

[4] In breach of the terms of the said agreement, the respondent failed to pay for the shares in accordance with the rules of the Kuala Lumpur Stock Exchange (now, Bursa Malaysia). B

[5] *Vide* letter dated 17 July 1998, the appellant terminated the said agreement and demanded from the respondent the immediate payment of the sum outstanding. Despite a second letter of demand, the respondent failed to pay the sum due. The appellant then filed the present suit in the High Court Kuala Lumpur. C

[6] In their statement of claim, the appellant's claim against the respondent was for the sum of RM33,258,017.27 as at 9 June 1998 together with interest of RM50 and further interest at the rate of 18% p.a. on the said sum of RM33,258,017.27 from 10 June 1998 until full and final settlement. D

[7] At the trial before the High Court, the appellant produced the following evidence in support of their claim: E

(a) The oral evidence of their Finance Manager, Lau Jiong Chean (PW1), and one Lim Jit Cheng (PW2) who gave evidence on behalf of the appellant's liquidator. F

(b) The following undisputed contemporaneous documents:

(i) Individual Account Application Form signed by the defendant containing the terms and conditions governing the account (ie, the said agreement) P1; G

(ii) the statement of account showing the indebtedness of the defendant as at 9 June 1998: P2;

(iii) the statement of account showing the report of history transactions of the defendant: P3; H

(iv) the certificate of verification pursuant to s. 90A of the Evidence Act 1950: P4;

(v) the purchase contract notes (PN073119A and PN073193): P5 I

A (vi) the certificate of verification pursuant to s. 90A of the Evidence Act 1950: P6;

(vii) the letter of authorisation given to PW2: P9;

B (viii) the letter of demand issued by the plaintiff's receivers and managers dated 17 July 1998: P10;

(ix) the certificate of posting: P11;

(x) the letter of demand issued by the plaintiff's solicitors dated C 16 September 1998: P12; and

(xi) the certificate of posting: P13.

[8] The respondent's defence, on the other hand, rested entirely on his oral evidence. In his testimony before the High Court, the D respondent alleged that he was given several blank forms by his old friend, Dato' Soh Chee Wen to sign; that he did not know that there was a facility opened under his name with the appellant; that he had not received the statement of outstanding sum due; neither has he received the contract notes for the E transaction of the UCB shares; and that he does not know who "DHM" is. (DHM was the remisier). In short the respondent's defence was a bare denial.

[9] At the conclusion of the trial, the learned trial judge found F that the appellant had failed to prove its case on a balance of probabilities and dismissed the appellant's claim with costs.

[10] From her judgment, it would appear that the learned judge's decision was premised *inter alia* on the following grounds:

G > Given the fact that there is no Non-Margin Facility Agreement produced by the plaintiff, but only the Individual Account Application Form of which there is no indication whether the defendant has actually applied for a Margin or Non-Margin Account, and in the absence of any evidence from the plaintiff that H the defendant has in fact given instructions to trade in the UCB shares, I find that the plaintiff has not discharged the burden of proof. The plaintiff's claim is accordingly dismissed with costs.

[11] After careful consideration of the appeal, we were constrained to agree with the appellant's counsel that there was I insufficient judicial appreciation of the evidence before her when the learned judge arrived at her decision, thus warranting appellate

intervention. In *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, the Federal Court held as regards appellate intervention, as follows:

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, *the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court*. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a *decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal*. This is consistent with the established plainly wrong test.
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> (emphasis added)

[12] We find that the learned judge had erred in law and in fact in failing to consider and to judicially appreciate the relevant contemporaneous documentary evidence as set out in para. (2) above which established on balance of probabilities that there was a concluded and binding contract between the appellant and the respondent and that the respondent was indebted to the appellant as claimed.

[13] The learned judge had also in our view failed sufficiently or at all to judicially appreciate the oral evidence adduced by PW1 and PW2 which was supported by the abovesaid contemporaneous documents which established that the outstanding sum as claimed by the appellant was due and payable by the respondent.

[14] We also find that in arriving at her finding and conclusion the learned judge had uncritically accepted the testimony of the respondent without properly evaluating and weighing the testimony of the respondent against the respondent's contemporaneous conduct and the contemporaneous documents. More importantly she failed to appreciate judicially that the respondent's testimony consisted of a bare denial which lacked any probative value.

[15] In finding that there was no evidence from the appellant as to the person who had actually received instructions from the respondent to purchase the shares we find that the learned judge failed to give sufficient regard to the fact that:

(a) the respondent had failed to protest to the transactions or usage of his non-margin trading account; and

(b) the respondent had never protested nor queried the appellant upon receiving the contract notes from the respondent and/or the letters of demand dated 17 July 1998 and 16 September 1998;

(c) the legal implication on the respondent's failure to protest or object to the transactions at the material time; and/or

(d) the fact that fraud or forgery was not pleaded by the respondent.

[16] We also agree with learned counsel for the appellant that the attempt by the respondent's counsel to raise issues on the Margin Facility Agreement and Power of the Attorney which were not dated, stamped nor signed before an advocate and solicitor; the uncompleted "Customer Assessment Form"; and the uncompleted letter of authorisation were irrelevant and immaterial in these proceedings as the appellant's claim was based on the outstanding sum in the non-margin trading account.

[17] Finally, we observed that in finding that there was no evidence to indicate whether the respondent had applied for a Margin or Non-Margin Facility Trading Account, the learned trial judge had failed to appreciate that cl. 1 of P1 actually and clearly provides that the terms and conditions in the said agreement applied to both Margin and Non-Margin Trading Account. Clause 1 of P1 reads as follows:

> I/We request you to open a securities trading/margin account ("account") and agree to abide by all laws relating to and/or governing my/our trading activities with you including without limitation the rules and regulations of the Kuala Lumpur Stock Exchange (KLSE) or any regulatory body as amended from time to time.

[18] The learned judge therefore erred in holding that the appellant could not rely on cl. 13 of the said agreement to establish that the statement of account showing the respondent's

indebtedness is final and conclusive for the purpose of legal proceedings on the ground that cl. 13 and the other terms and conditions of the said agreement (referred to by PW1 in his evidence) were not in respect of the terms and conditions for the Non-Margin account but in respect of a Margin account.

[19] For the above reasons, we allowed the appeal, set aside the decision of the High Court and substituted it with an order that the appellant's claim be allowed. We also awarded costs in the sum of RM25,000 and ordered that the deposit be paid to the appellant on account of fixed costs.

Suriyadi Halim Omar JCA:

[20] The facts are as follows. It was alleged that an agreement was executed between the plaintiff and the defendant whereby the plaintiff was to deal with the purchase and sale of shares. The agreement was a non-margin facility. It was agreed that the plaintiff was to sell when required and the defendant to indemnify the plaintiff when the need arises. The plaintiff did comply with the agreement but the defendant failed to indemnify when losses arose. The plaintiff then terminated the agreement. The plaintiff subsequently took up action against the defendant for contra losses of RM33,258,017.27 at the High Court.

[21] During the proceedings PW1 testified that the defendant had signed the individual application form whereupon the shares were bought. Unfortunately, the very person who received the instruction of the transaction was not called. After a full trial the plaintiff lost and filed this appeal.

[22] I dismissed the appeal on the basis that there was no error on the findings of the High Court. I agreed with the High Court's findings that:

(i) the agreement ie, P1 was not dated and stamped. Section 52 of the Stamp Act 1949 (Consolidated and Revised 1989) provides that such document is inadmissible in court as evidence;

(ii) this agreement pertained to a Margin Agreement whilst the plaintiff's claim was based on a Non-Margin Account;

(iii) the power of attorney was not dated and was not properly executed;

A (iv) the document was not filled up; and

(v) the authorisation letter did not mention the authorized person who would deal with the account.

B **[23]** For the above reasons, I concluded that the agreement was not properly executed. P1 did not establish the existence of a non-margin facility agreement. I was not convinced that the defendant had applied for the facility hence my dismissal of the claim.

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